Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions in the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	
	)	
(Access to Rights-of-Way)	)	

JOINT CONSOLIDATED COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND UTC ON PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, the Edison Electric Institute (EEI) and UTC, The Telecommunications Association (UTC),[1] respectfully submit the following consolidated comments on various "Petitions for Clarification and/or Reconsideration" of the *First Report and Order* (*FR&O*), FCC 96-325, released August 8, 1996, in the above-captioned matter. EEI's and UTC's comments are limited to those petitions that seek reconsideration or clarification of issues addressed in Section XI.B. (paragraphs 1119-1240) of the *FR&O* relating to access to rights-of-way by telecommunications service providers.

As the principal representatives of the utilities directly impacted by the Commission's interpretation and implementation of the Pole Attachment Act , 47 U.S.C.

[1] UTC, The Telecommunications Association, was formerly known as the Utilities Telecommunications Council.

Section 224, as amended by Section 703 of the Telecommunications Act of 1996, both EEI and UTC fully participated in this proceeding by filing Joint Comments and Joint Reply Comments in response to the underlying *Notice of Proposed Rulemaking.* In addition, EEI and UTC also filed a "Petition for Clarification/Reconsideration" regarding certain aspects of the *FR&O.* EEI and UTC are therefore pleased to offer the following comments.

I. Efforts to Broaden the Provisions of the Act To Encompass Facilities Beyond Poles, Ducts, Conduits and Rights-of-Way Should Be Rejected

Throughout this proceeding EEI and UTC have focused on the direct impact that the FCC's interpretation and implementation of the Pole Attachments Act, 47 U.S.C. §224, as amended by the Telecommunications Act of 1996, will have on the country's investor-owned electric utility industry. EEI and UTC have stressed that in implementing the amendments to Section 224, the FCC must recognize that utilities design, own and maintain poles and other distribution facilities as an integral part of their obligation to provide reliable, safe and affordable electric service to the public, and that third-party telecommunications attachments to utility facilities are an incidental use that should not be allowed in any way to undermine or detract from the primary purpose of these facilities. Consistent with this approach, EEI and UTC urge the Commission to resist efforts to broaden the application of the Act's pole attachment provisions beyond the clear and literal intention of Congress.

WinStar Communications has requested the FCC to clarify that utilities are obligated under the pole attachment provisions to provide access to rooftops and riser

conduit for the attachment of microwave facilities. In the *FR&O* the Commission quite properly rejected this argument stating:

> *We do not believe that Section 224(f) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission towers...*[2]

WinStar raises no new arguments as to why access should be afforded to utility rooftops other than the observation that access to poles, ducts and conduit are of "virtually no use" to wireless providers because the configuration of their systems "avoids the need for these conventional right-of-way obstacles."[3] The fact that access to utility poles, ducts and conduits does not benefit WinStar and other wireless providers in the same manner as it benefits wire-based telecommunications carriers is insufficient justification to broaden the scope of the Act to reach other utility facilities. From a competitive point of view their is no inherent advantage in attaching to the rooftops of utility corporate offices over any other type of rooftop. Further, as EEI and UTC noted in their reply comments, electric utilities typically do not own building riser or building entrances and have little control over the use of such space beyond the installation and maintenance of electric facilities.

On a more fundamental level the WinStar petition raises a troubling aspect with the *FR&O's* failure to clearly delineate utility facilities that are outside the scope of the Act. The pole attachment provisions speak in terms of poles, ducts, conduits and right-of-way owned or controlled by the utility; it does not contemplate access to any and all utility facilities or facilities for which utilities do not have legal control. As the petitions

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[2] *FR&O*, para. 1185.
[3] WinStar, p. 3.

for reconsideration of the Infrastructure Owners, Florida Power & Light (FPL) and ConEdison demonstrate the Commission erred in its decision not to conclusively hold that electric transmission towers are beyond the scope of Section 224.[4] In declining to eliminate transmission towers from the pole attachment provisions, the Commission stated that "the breadth of the language contained in section 224(f)(1) precludes us from making a blanket determination that Congress did not intend to include transmission facilities."[5] However, the Commission's decision with regard to transmission towers is inconsistent with the plain language of the statute, the legislative history of the pole attachment Act, as amended, and the intent of Congress. The plain unambiguous language of section 224 specifically limits its application to "poles, ducts, conduits and rights-of-way." As FPL notes, based on this plain language it is clear that if Congress had intended to include transmission facilities it would have explicitly stated as such.[6]

It is important to recognize that the underlying goal of the 1996 Act is to open the local exchange telecommunications market to competition, and therefore Sections 251 and 703 of the Act require access to the local distribution facilities of incumbent local exchange carriers. The FCC itself acknowledged this point in the FR&O stating:

> *The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.*[7]

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[4] Infrastructure Owners, pp. 37-40; FPL, pp. 33-36; ConEdison, p. 11.
[5] *FR&O*, para. 1184.
[6] FPL, pp. 34-35.
[7] *FR&O*, para. 1185 (emphasis added).

Moreover, the Act does not require long distance telephone companies to make their transmission facilities and towers available for attachments because this is already considered a competitive facilities-based market. It would therefore be inconsistent to require electric utilities to provide access to their long haul transmission facilities.

As the Infrastructure Owners point out, the 1996 amendments to the Pole Attachment Act retain the same language as the 1978 Act in describing the types of utility infrastructure that are subject to attachments.[8] It is therefore appropriate to look at the legislative history and subsequent FCC interpretation of the 1978 statute to determine the scope of the new Act. The 1978 Act applied only to attachments by cable television operators and therefore was only intended to apply to utility distribution facilities that facilitated the development of cable services in residential markets. The legislative history of the 1978 Pole Attachments Act indicates that the Commission's jurisdiction over pole attachments is triggered only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.[9] Thus FCC jurisdiction was premised on utility facilities that have been specifically designed and utilized for wire telecommunications such as a telephone pole. Electric transmission towers in contrast are not designed for wire communications and would therefore not be subject to the FCC's jurisdiction.

Finally, the FCC's own interpretation and implementation of the 1978 Act evidences that the Pole Attachment Act does not apply to transmission towers or other transmission facilities. FPL points to a 1989 FCC *Memorandum Opinion and Order*,

[8] Infrastructure Owners, p. 38.
[9] S. Rep. No. 95-580, 95th Cong., 1st Sess., p. 15 (1977).

where the Commission described the 1978 Act as authorizing the cable television industry to lease space on "distribution" poles owned by electric utilities and telephone companies.[10] In addition, the Infrastructure Owners cite at least two other instances where the FCC has indicated that "towers and extremely tall poles" are utility facilities not normally used for attachments.[11]

Given the plain language of the statute, the underlying intent of the 1996 Act to open distribution facilities, and the Commission's earlier interpretations of the Pole Attachment Act, the Commission should specifically exclude electric transmission towers from the application of revised section 224.

II. Future Revenues A Utility May Earn From Additional Capacity As A Result Of Modifications Are Irrelevant Under The Statute

Under section 224(h) an attaching entity that modifies its existing attachment is responsible for the proportionate share of the costs of making the facility accessible. MCI requests that, in instances where a facility modification creates additional capacity that may be used to generate future revenue for the utility owner, the utility should be required to escrow this revenue and distribute it to the parties that paid for the modification.[12]

The FCC rejected this suggestion in the *FR&O* noting that:

> *Section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of a proposed*

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[10] FPL, p. 36, citing: *In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 F.C.C.Rcd. 468 (1989).
[11] Infrastructure Owners p. 39, citing: *In the matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co.*, 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); and *In the matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia*, 1984 FCC Lexis 2400 (1984).
[12] MCI, p. 34.

modification. The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds.[13]

MCI attempts to argue that attaching entities should have an interest in a pole merely because the FCC will allow a modifying party to recover a proportionate share of the modification costs from subsequent attaching parties that are able to obtain access as a result of the modification. This argument is misplaced, MCI is confusing the recovery of modification costs with the receipt of revenues from a new attachment. In essence MCI is arguing that beyond recovery of its proportionate costs of a modification it is entitled to revenues as a pole owner without any of the burdens. Attaching entities that wish to enjoy the "benefits" of pole ownership are always free to install their own facilities.

MCI also fails to recognize that as additional capacity is utilized by subsequent attaching entities, all attaching parties will benefit from the net reduction in their proportionate share of the pole attachment costs under the new rate formula prescribed in the 1996 Act.[14] Finally, MCI ignores the fact that pole owners, and electric utilities in particular, modify their facilities because of their own internal requirements, not to market additional capacity to future attachees. Given the non-compensatory nature of the rate formula in Section 224, there is no fiscal incentive for utilities to increase capacity on a speculative basis.

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[13] *FR&O,* para. 1216.

[14] Even under the rate formula prescribed in the 1978 Act, all other things being equal, the rate for an attachment will decrease if the amount of "usable space" increases.

III. Separate Certification Should Not Be A Precondition To State Regulation Over Access

The 1978 Pole Attachment Act allowed a state to "reverse preempt" the FCC's authority over rates, terms and conditions for pole attachments if the state certified to the Commission that it intends to regulate such rates, terms and conditions. The 1996 Act expanded the scope of the states' authority to preempt the FCC to include authority over access. In interpreting this new provision, the FCC determined that the states are not required to certify as a precondition to regulating access. The National Cable Television Association (NCTA) has requested that the FCC reconsider this decision.[15]

EEI and UTC oppose NCTA's suggestion. Section 224(c)(3), which establishes the conditions for a state to "reverse preempt" the FCC's pole attachment authority, only relates to regulation of "rates, terms and conditions." State regulation of "access to poles, ducts, conduits, and rights-of-way as provided in subsection (f)" has preemptive effect under Section 224(c)(1) without regard to certification to the FCC or any procedural requirements for handling complaints. Thus, for example, where a local authority has established requirements regarding shared access to and use of utility infrastructure, such requirements are entitled to preemptive effect under Section 224(c). Such an interpretation is not only consistent with a plain reading of the statute, but also recognizes that many state and local requirements regarding access to utility facilities have already been established. Provided that these requirements do not act as a discriminatory barrier to entry under Section 253, this authority should remain in place.

[15] NCTA, pp. 20-21.

IV. Conclusion

The pole attachment provisions represent a significant cost and burden on utilities, their customers, and their shareholders. The FCC should avoid an exacerbation of this impact by resisting the efforts of those who wish to take additional utility property beyond poles, ducts, conduits and rights-of-way. The plain language of the Act as well as its legislative history makes clear that the statute's provisions were only intended to apply to utility distribution facilities, and not transmission towers, corporate rooftops or other miscellaneous utility property.

The FCC properly determined that future revenues a utility may earn as a result of modifications resulting in additional capacity are irrelevant under the statute. The FCC should therefore reject MCI's request to use future revenues to offset an attaching entity's proportionate share of modification costs.

Finally, the FCC should not require certification as a precondition to state preemptive authority over access to poles, ducts and conduits.

WHEREFORE, THE PREMISES CONSIDERED, EEI and UTC respectfully request the FCC to take action in accordance with the views expressed in these consolidated comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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